In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-431

RANDOLPH ROBINSON,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio, which was entered in this case on June 27, 1979, reversing the judgment of the Court of Appeals for the First Appellate District of Ohio, which had upheld petitioner's motion to suppress evidence gained from a search of a closed non-transparent bag located in the locked trunk of petitioner's automobile, on the grounds that inventory searches of impounded vehicles violate the Fourth and Fourteenth Amendments of the Constitution of the United States if they go beyond actions reasonably undertaken to determine the need of impoundment and to safeguard impounded property.

OPINIONS BELOW

The June 27, 1979 opinion of the Supreme Court of Ohio, for which review is sought, is reported at 58 Ohio St. 2d 478, 391 N.E. 2d 317 (1979) and printed here as Appendix A. The opinion of the Court of Appeals for the First Appellate District of Ohio, Hamilton County, is unreported and printed here as Appendix B. The judgment entry of the Hamilton County Court of Common Pleas is printed here as Appendix C.

JURISDICTION

On June 7, 1977, a motion to suppress the evidence obtained from the "inventory" search of petitioner's automobile was overruled by the Hamilton County Court of Common Pleas. Petitioner subsequently entered a plea of no contest to the charge of possession of marijuana. The Court made a finding of guilt, and from that conviction petitioner appealed, alleging error in failing to grant the motion to suppress. On July 26, 1978, the Court of Appeals reversed the judgment of the trial court. Respondent State of Ohio appealed this decision to the Supreme Court of Ohio. On June 27, 1979 that Court reversed the Court of Appeals ruling, issuing a blanket statement that inventory searches are an exception to the warrant rule and making no comment on the specific issues of 4th and 14th Amendments as to the act of impoundment and the method, depth and manner of the so-called "inventory search" herein, although such issues were briefed and argued before it by both parties. Notice of appeal to this Court was given on July 20, 1979. Review of that decision by this Court is sought under the jurisdiction invoked by 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

I. Following a traffic arrest, do the Fourth and Fourteenth Amendments require inquiry into the reasonable necessity of impounding the parked automobile that is in the possession of the detainee at the place of the arrest?

II. Before conducting an inventory search of impounded property, is a police officer required by the Fourth and Fourteenth Amendments to follow a "reasonableness" or "totality of the circumstances" test for determining whether (a) impoundment is necessary or reasonable and (b) the search is necessary, in order to meet the rationales underlying the inventory search exception to the warrant requirement?

III. Does the owner of an automobile have a reasonable expectation of privacy in closed containers secured within the vehicle's locked trunk, sufficient to establish the supremacy of his property rights over the caretaking procedures of law enforcement personnel?

IV. Does the physically present owner of an impounded automobile have the right to (a) participate or be consulted in the decision whether impoundment is reasonable or necessary and (b) waive the protection offered him by police procedures ostensibly designed to safeguard his property?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States, which provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Because a challenge to the validity of State police practices is presented, this case also involves Section 1 of the Fourteenth Amendment to the Constitution of the United States. That section reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On February 9, 1977, City of Greenhills Police Officer, Donald Yost stopped the petitioner, Randolph Robinson, on Winton Road, Hamilton County, Ohio, about a mile from the drivers home, for the purpose of issuing a traffic citation for speeding. The officer took Mr. Robinson's driver's license and asked that he move his vehicle off the highway to a side road, which Mr. Robinson did. The officer called for a computer check on petitioner Robinson, and received the reply that his driver's license had been suspended. Robinson was arrested for driving without a valid license. It was later discovered that the computer information was erroneous.

The officer determined to take Mr. Robinson to the police station, approximately one-half mile from where the car was parked. The officer also confiscated both the ignition key and trunk key of petitioner's car, and said that the vehicle would be towed to a private impoundment lot. Petitioner Robinson asked the officer to return the keys, but the officer said they were necessary to tow the vehicle. The officer told the petitioner nothing about the need for an inventory search, nor about arrangements for return of the vehicle or its keys. There was no discussion of the possibilities of securely locking the vehicle.

The officer testified that he "had planned to impound the car all along", and after the Petitioner was removed to the station house, Officer Yost remained alone and began to prepare the car for towing. While awaiting the arrival of the wrecker, Officer Yost, alone and unassisted and on his own authority, proceeded to search the vehicle pursuant to what he described as a "custodial inventory of the vehicle." During this procedure the lone officer unlocked the trunk of the car and found a tool box, a

closed opaque white plastic bag, and several other items which he deemed "without value".

The officer listed the tool box on a form marked "Report of Motor Vehicle Impoundment and Inventory of Property", and although he admitted opening the tool box, none of its contents were listed in the report. The officer also opened the closed plastic bag found in the trunk. Within that bag were found additional bags, which were later found to contain marijuana.

Robinson was indicted by the Hamilton County Grand Jury for possession of a controlled substance, in violation of Ohio Revised Code § 2925.03 (A) (4). He moved to suppress the evidence obtained from the trunk of the automobile on June 7, 1977. The motion to suppress was overruled by the Hamilton County Court of Common Pleas, on June 8, 1977 (Case Number B-770734) and petitioner subsequently entered a plea of no contest to the offense charged in the indictment.

The court found petitioner guilty as charged, and sentenced him to serve 180 days in the city jail and five years probation. From that conviction, petitioner brought an appeal in the Court of Appeals of Ohio, First Appellate District, Hamilton County, Ohio, (case number C-77635), alleging trial court error in the denial of the petitioner's motion to suppress.

The Court of Appeals reversed the judgment of the trial court on that issue. (Appendix B.) On July 26, 1978 the Court stated that the search was invalid because it had gone beyond the scope necessary to accomplish its limited goals, in essence becoming a warrantless investigatory search. The Court stated:

> "We hold that the denomination of the search in the the present case as an inventory search does not remove it from the strictures of the Fourth Amendment * * *."

Respondent appealed to the Supreme Court of Ohio. That Court on June 27, 1979, reversed the judgment of the Court of Appeals and affirmed that of the Court of Common Pleas. That Court made no comment on the unique facts herein, addressing itself only to the generality of the legality of "inventory searches."

From that judgment, petitioner filed a Notice of Intention to seek review by the Supreme Court of the United States, and now petitions for the writ of certiorari to be issued to the Supreme Court of Ohio.

REASONS FOR GRANTING THE WRIT

Reasonableness of police procedures in searches has been the litmus paper by which Fourth Amendment challenges are tested, and this case squarely presents questions of reasonableness in impoundment of automobiles and subsequent unwitnessed and highly extended so-called inventory searches. As stated by the majority in *South Dakota* v. *Opperman,* 428 U.S. 364 at 374 (1976).

> ". . . as in all Fourth Amendment cases, we are obliged to look to all the facts and circumstances of this case . . ."

The facts in *Opperman,* as the Court next states, were that:

> ". . . police were indisputably engaged in a caretaking search of a lawfully impounded automobile . . . The owner . . . was not present to make other arrangements for the safekeeping of his belongings. The inventory itself was prompted by the presence in plain view of a number of valuables inside the car . . . there is no suggestion whatever that this standard procedure was a pretext concealing an investigatory police motive . . ." *South Dakota* v. *Opperman, supra* at 374

Several state Supreme Courts have cited *Opperman* to validate variety of inventory searches,* as did the Ohio Supreme Court in petitioner's case. *Ohio* v. *Robinson,* 58 Ohio St. 2d 478 (1979). The Ohio Court failed, however, to examine the case in light of the reasonableness standard, and an examination of the facts in petitioner's case, each different from the facts of *Opperman* quoted above, will underscore the necessity of requiring police procedures to be based upon the totality of the circumstances both as to the impoundment itself and thereafter as to manner and mode of the searching. The creation of a sub-species of governmental action labeled "inventory searches" does not cause abandonment of 4th and 14th amendment considerations. *Opperman* does not preclude careful inquiry into both the reasonableness of impoundment, safeguarding of property and invasion of reasonable expectation of privacy.

As Justice Powell succinctly stated in his concurring opinion in *Opperman*:

> ". . . Upholding searches of this type provides no general license for the police to examine all the contents of such automobiles . . . The absence of a warrant will not impair the effectiveness of post-search review of the reasonableness of a particularly inventory search."
>
> *Opperman, supra* at 378 and 382.

The proper constitutional perimeters of impoundment and inventory searches are at issue here. In almost every

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* It is interesting to note that on remand, the South Dakota Supreme Court expressly declined to follow the United States Supreme Court's validation of the *Opperman* inventory search, and elected instead to afford greater protection under state law than that required by the *Opperman* majority. 428 U.S. 364 *State* v. *Opperman,* 247 N.W. 2d 673 (S.D. 1976)

particular the given case gives an example of the dangers of exception to warranted search being used as a self created rationale for a curiosity search.

FOLLOWING A TRAFFIC ARREST, DO THE FOURTH AND FOURTEENTH AMENDMENTS REQUIRE INQUIRY INTO THE REASONABLE NECESSITY OF IMPOUNDING THE PARKED AUTOMOBILE THAT IS IN THE POSSESSION OF THE DETAINEE AT THE PLACE OF ARREST?

Certainly, it is well-settled law that police may frisk arrestees in an effort to protect the officer from weapons which an arrestee may be carrying. *Terry* v. *Ohio,* 392 U.S. 1 (1968). And if an arrestee does not post bond but instead must be jailed awaiting trial, the personal belongings he carried at the time of the arrest will be taken from him and cataloged. This is to satisfy procedures designed to protect jail personnel, as well as to prevent thievery or destruction of property of detainees.

But a more difficult question arises when a person is arrested while in his car. Even more difficult is the situation where closed containers are locked out of sight within the car. Once the arrestee is outside the automobile, his person is searched, and he is under the control of the police, the justification for search incident to arrest ends, since the arrestee cannot reach for a weapon and there is no longer a danger posed to the police. *Robinson* v. *U.S.,* 414 U.S. 218 (1973). *Gustafson* v. *Florida,* 414 U.S. 260 (1973). In this case, the area within the immediate control of the suspect could be said to include the driver's area of his car, and thus that area could be searched,

Adams v. *Williams,* 407 U.S. 143, 149 (1972). But the Court has never addressed the situation presented by this case, where a search incident to arrest led to at best transient impoundment and warrantless search of the closed container in a locked trunk of petitioner's automobile, via a key arbitrarily confiscated.

The propriety of automobile inventory searches in general was established by this Court in *South Dakota* v. *Opperman, supra. Opperman* made clear that the automobile must legitimately come under police custody in order for an inventory search to be conducted. *Id.* at 365. It did not establish the conditions under which custody of the vehicle could validly be undertaken, and certainly did not even hint that impoundment itself was an absolute authority.

This case is unlike the *Opperman* situation whereby an automobile is impounded as a sort of security for the payment of debt to the city (unpaid traffic tickets), and where the owner of the car is not present at the time of impoundment. It is not similar to *Cady* v. *Dombrowski,* 413 U.S. 433 (1973), where impoundment was lawful because the car was a public nuisance on the highway and the driver was too intoxicated to make arrangements to have the vehicle towed and stored. In this case, a driver stopped for a traffic offense, and arrested for a minor misdemeanor, was not consulted as to the impoundment of his car though obviously other arrangements were possible and even desirable. Petitioner would certainly have been able to return to his car in less than an hour, since his offense was station house bondable and he was within walking distance of both his home and the police station. Furthermore, he could readily have arranged for family or friends to pick up the car, which was parked by the officer's directions. There was no reason to believe the vehicle

contained objects dangerous to the public, as in *Cady, supra.* Moreover the officer made no inquiry nor entered into discussion whatsoever with the competent and present owner as to accomodations, if any was needed. The officer made a preliminary and unwarranted seizure of the keys and ignored the detainees request for their return. The impoundment itself was unreasonable and should be overturned by this Court, lest we translate the *Opperman* exception to warranted search to a device for bypassing warrant requirements in any auto or luggage situation.

Other than the discussion as set out above in *Opperman* and *Cady, supra,* this Court has not addressed the issue of what constitutes a reasonable impoundment. Numerous state Courts do however provide some guidance. In reviewing the state court decisions in the wake of *Opperman,* a growing number of jurisdictions require a showing of substantial police need before approving an impoundment. In *State* v. *Goodrich,* 256 N.W. 2d 506, 62 Minn. 1280 (1977), the Supreme Court of Minnesota articulated a position compatible with both the guarantees of the Fourth Amendment and the legitimate goals of impoundment and inventory. Before determining whether an inventory search was reasonable, the Court directed a threshold inquiry to the reasonableness of the impoundment, itself, "since that act gives rise to the need for and justification of the inventory." *Id.* at 510 the Minnesota Court then adopted a reasonableness standard for determining the validity of an impoundment prior to an inventory search:

> Reasonableness is to be evaluated on considerations relevant to Fourth Amendment interests, notion a subjective view regarding the acceptability of certain sorts of police conduct. A contrary approach would create a temptation for police to use an unconnected

temporary predicament of a motorist as a pretext for an investigation unauthorized by a warrant. *Id.* at 511

Numerous other jurisdictions have adopted a reasonableness test for impoundment, (which is indeed a species of seizure) placing the burden of establishing the reasonableness on the police, taking into account whether the owner is capable of making other arrangements for the safekeeping of his vehicle; *State* v. *Stockbower,* 397 A. 2d 1050, 79 N.J. 1 (1979); *Virgil* v. *Superior Court,* 268 Cal. App. 2d 127 (1968); *Altman* v. *State,* 335 S. 2d 626 (Fla. D.C.A. 1976); *City of Danville* v. *Dawson,* 528 S.W. 2d 687 (Ky. C.A. 1975); *State* v. *Rome,* 354 S. 2d 504 (1978).

Certainly the impoundment was unreasonable in this case with a police escort, petitioner could have moved the car to the police station one-half mile away, even though it was thought he had no valid driver's license, and a friend could have picked him up following his booking for driving without a license. Or he could have left the car on a side road of the highway, parked as directed by the officer, if he wished, and returned with a friend within an hour or two. Instead, the mere fact of his arrest on any charge, substantial or not, is said to justify the expense and intrusion of property rights that impoundment represents. Certainly this cannot be the rule.

BEFORE CONDUCTING AN INVENTORY SEARCH OF IMPOUNDED PROPERTY IS A POLICE OFFICER REQUIRED BY THE FOURTH AND FOURTEENTH AMENDMENTS TO FOLLOW A "REASONABLENESS" OR "TOTALITY OF THE CIRCUMSTANCES" TEST FOR DETERMINING WHETHER:

A. Impoundment Is Necessary Or Reasonable, And

B. The Search Is Necessary In Order To Meet The Rationales Underlying The Inventory Search Exception To The Warrant Requirement?

Reasonableness is the standard for deciding whether to search impounded property, as well as for deciding whether to impound property in the first place. The question of an inventory search is logically distinguishable from those cases involving the "automobile exception" to the warrant requirement. In the latter type of case, warrantless searches of automobiles are permitted if there is probable cause to believe the driver has placed articles in the car which give evidence of criminal activity. *Carroll* v. *United States,* 267 U.S. 132 (1925). The reasoning is that, due to the inherent mobility of the car, there is no time to get a warrant. Probable cause, is "the measure of legality" of such a seizure. *Chambers* v. *Maroney,* 399 U.S. 42 (1970).

But it is important to distinguish searches of automobiles that are conducted, not upon probable cause, but only as an administrative function for protection of the property. "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and

disappears." *Coolidge* v. *New Hampshire,* 403 U.S. 443 at 461 (1971).

Instead, we are concerned here with the proper boundaries of inventory searches. These administrative searches are discussed in *Opperman* v. *South Dakota, supra,* and are said to be justified "in response to three distinct needs":

> "The protection of the owner's property while it remains in police custody . . . the protection of the police against claims or disputes over lost or stolen property . . . and the protection of the police from potential danger . . ."
>
> *Opperman, id.* at 370.

That the inventory procedure itself is valid as a community caretaking function is beyond question, but *Opperman* cannot be used to validate virtually every so-called inventory search in its entirety. Rather, each case is judged by a reasonableness standard which balances the intrusion necessary to accomplish the goals of the administrative cataloging versus the reasons to begin that cataloging at all.

In petitioner's case, there was no question of potential danger to the police. Petitioner was stopped for a routine speeding charge. There was no indication of possession of weapons or the desire to hinder in any way the performance of the officer's functions. Unlike *Cady* v. *Dombrokski, supra,* in which an inventory search was necessary because the police had real reason to believe there were weapons in the trunk of the car this case presents no such reasonable supposition. A traffic offense does not imply that weapons or contraband may be found in the vehicle, and thus searches to protect the police are not necessary.

Dyke v. *Taylor Implement Manufacturing Co.,* 391 U.S. 216 (1968).

As to the questions of protection of the owner's property and the protection of the police from false claims over lost property, ". . . we are obliged to look to all the facts and circumstances of this case . . . Whether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends on the facts and circumstances . . ." *Opperman, supra,* at 374, quoting *Cooper* v. *California,* 386 U.S. 58 at 39 (1967). In petitioner's case, the property was secure. The car itself could easily have been taken to the police station for forty-five minutes, without a substantial chance of property destruction before the owner would be released. It is even more outrageous that a search of the securely locked trunk be conducted in the guise of "protecting the property of the arrestee," particularly when the officer took the separate trunk key into his possession against the wishes of the owner. The property was obviously well secured to begin with. Finally, snooping into closed, opaque containers within the locked trunk does nothing to protect either the owner or the police. Rather, it begins to give the appearance of harassment and pretextual search.

As the Fifth Circuit noted in *U. S.* v. *Guill,* 484 F. 2d 990 at 991-992 (1973):

> "It is temptingly simplistic to employ the phrase 'inventory' as though uttering it solves everything, and all too easy to state over broadly the interests which inventory searches vindicate, and to automatically give to those interests a primacy, which in the balance between public and private interests, they do not necessarily enjoy."

DOES THE OWNER OF AN AUTOMOBILE HAVE A REASONABLE EXPECTATION OF PRIVACY IN CLOSED CONTAINERS SECURED WITHIN THE VEHICLE'S TRUNK, SUFFICIENT TO ESTABLISH THE SUPREMACY OF HIS PROPERTY RIGHTS OVER THE CARETAKING PROCEDURES OF LAW ENFORCEMENT PERSONNEL?

It is beyond dispute that the touchstone of Fourth Amendment Analysis in examining searches of personal property is whether there was a reasonable expectation of privacy in the property on the part of the owner. *Katz* v. *U. S.*, 389 U.S. 347 (1967). The appropriate expectation of privacy depends on the type of property, the scope of the search, and similar factors. For example, as noted above, there is a lesser expectation of privacy in an automobile than in one's house or office, because automobiles are subjected to public view and their movement is regulated by the state. *Chambers* v. *Marovey, supra.* But where personal property is locked or secured in such a way that it "manifests an expectation that the contents would remain free from public examination," *U. S.* v. *Chadwick,* 433 U.S. at 11 (1977), there is greater protection against State intrusion.

In petitioner's case, a locked trunk was opened and searched. Further, a closed, opaque plastic bag inside the trunk was opened and examined. Clearly, petitioner had a great expectation of privacy in both the trunk and the bag. The "automobile exception" may afford reason to search a passenger compartment, or even an unlocked glove compartment where title and registration papers are often kept, as in *Opperman,* but a trunk is an area in which a car owner has a greater expectation of privacy. *Winberly* v. *Superior Court,* 546 P. 2d 417 (Cal. 1976);

State v. *Bradshaw,* 322 N.E. 2d 311 (Ohio C.A. 1974). The fact that a trunk is part of a car does not fit it under *Chambers*-type automobile searches; rather, the fact that it is locked personal property shows an expectation of privacy similar to that of locked personal luggage as in *U. S.* v. *Chadwick, supra.* This is heightened in this case by the officer's unilateral and unessential seizure of the separate key to such locked automobile trunk.

As to the closed bag, clearly privacy is expected in closed containers placed in private spaces. As long as the outward appearance of a bag gives no indication of illegal contents, a proper inventory search simply catalogs the existence of the bag itself. This is true whether the bag is locked or not. *Arkansas* v. *Sanders,* 99 S. Ct. 2586 (1979); *People* v. *Counterman,* 556 P. 2d 481 (Colo. 1976). The rule in such a case, if an inventory search is valid from the start, should be to note the existence of the bag or container in the trunk without detailing contents. The function of the inventory is therefore completed, and the privacy of the citizen is also protected.

Moreover, an expectation of privacy is manifested in this case due to the nature of the arrest. This is not a case where a suspect was arrested for an offense relating to property (such as theft offenses, where stolen goods may have been in the trunk) or an offense indicating a violent temperament of the owner (such as armed robbery, where weapons might be in the trunk). This was a simple arrest under the mistaken belief that the car's owner was driving without a valid driver's license. The vehicle search could be justified not upon probable cause, but only upon inventory search rationales. Surely in an inventory search of private property unconnected to the offense charged, there is a greater expectation that the privacy rights of the citizen will be closely observed.

Moreover, since an intrusion into his property is being carried out, a citizen in such a situation surely should at least have the opportunity to consult with the police as to the treatment of the property. On a simple license offense such as this, a citizen expects his private property to remain under his control to a large degree. Surely he should be permitted to make arrangements to have the property picked up by a friend. *Altman* v. *State, supra.* Or he has the reasonable expectation that police intrusion will be so minimal as possible. In a case in which the charge for which the car owner is arrested is unrelated to the property sought to be searched, it seems natural that the owner retains important property rights. Thus, when officer Yost refused to return the keys to petitioner's car to him, and refused to discuss alternatives to towing, he violated petitioner's privacy rights under the Fourth Amendment.

Finally does not the conduct of the so called administrative search have to be conducted in a manner consistent with the rationale that gives rise to its exceptional status. If so, can this search be deemed to be protective against either false claim, danger, or property loss? It is conducted without corroborating witnesses, not at a station house or impoundment lot but alone on a side road during the night, after the owner has been taken away? The manner is such as to dissipate each of the rationales of *Opperman.*

DOES THE PHYSICALLY PRESENT OWNER OF AN IMPOUNDED AUTOMOBILE HAVE THE RIGHT TO:

A. Participate Or Be Consulted In The Decision Whether Impoundment Is Reasonable Or,

B. Waive The Protection Offered Him By Police Procedures Ostensibly Designed To Safeguard His Property?

As noted above, the rationales for inventory searches include the protection of the property of the detainee, the protection of the police from disputes over lost property, and protection of the police from potential danger. *Opperman, supra* at 370. It has been established that in this traffic arrest, the police were in no danger. Our analysis therefore turns on the question of protection.

As *Opperman* clearly states, this administrative procedure is designed to protect the property from pilferage or damage. It is thus intended to protect the property rights of the citizen during the time when he has no direct control over the property. Procedures designed to protect private interests may be waived by the protected person, if the waiver is knowing and intelligent. *Faretta* v. *California,* 422 U.S. 806 (1975).

In this case, after a simple consultation between the arrestee and the police as to the impending inventory search of the vehicle, the petitioner should have been permitted the opportunity to waive either the impoundment or the inventory of the vehicle, or both. Both procedures were designed to protect his property and to prevent him from claiming police misuse of the property. If he would chose to simply retrieve the property an hour or so later, saving the expense of towing and the intrusion into his

private property, he should be able to waive the protection offered him by the caretaking procedures.

Such a waiver could be easily accomplished by a discussion between the detainee and officer as to the advantages of impoundment and inventory, and a brief spoken or written explanation of the consequences of waiver. Such an explanation and a waiver form itself could have been printed on the reverse side of Officer Yost's "Report of Motor Vehicle Impoundment and Inventory of Property." The absence of such an approach suggests the use of the inventory search in this case to be a pretext for a broad search of the vehicle, where no other type of search could possibly have been remotely possible under the Fourth Amendment.

CONCLUSION

This Court in all of its concurring and dissenting decisions in *Opperman* recognized the need for caution against a broad-stroked self-sustained invasion of privacy by police under the ambit of an exceptional administrative procedure. That prescience was well placed. The reasonableness of both impoundment, and of nature, manner, and extent of so-called inventory searches are all measured by the operative facts of this case.

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

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APPENDIX A

THE STATE OF OHIO, APPELLANT, *v.* ROBINSON, APPELLEE.

[Cite as State v. Robinson (1979), 58 Ohio St. 2d 478.]

Criminal law—Search and seizure—Inventory search of lawfully impounded vehicle—Constitutionality.

A standard inventory search of the trunk of a lawfully impounded automobile does not contravene the Fourth Amendment to the United States Constitution.

(No. 78-1206—Decided June 27, 1979.)

APPEAL from the Court of Appeals for Hamilton County.

On February 9, 1977, appellee, Randolph F. Robinson, was arrested for driving a motor vehicle while his operator's license was under suspension. Subsequent to the arrest and removal of appellee to the police station, a tow truck was summoned for the purpose of transporting appellee's vehicle to a commercial storage lot for impoundment.

Prior to the arrival of the truck, the arresting officer procured a standard inventory form from his police cruiser and began a custodial inventory of appellee's automobile. After completing an inventory of the valuables located within the interior of the vehicle, the officer, in accordance with standard department procedure, inspected and inventoried the contents of the vehicle's trunk. Therein, a large plastic bag was found, which contained numerous smaller bags of marijuana. The total quantity of the substance exceeded the bulk amount specified by R. C. 2925.03 (A) (4).

The Hamilton County Grand Jury indicted appellee for possession of a controlled substance in violation of R. C. 2925.03 (A) (4). A plea of not guilty was entered and appellee moved to suppress the evidence obtained from the trunk of the automobile. The motion was overruled. Appellee then withdrew his earlier plea and pleaded no contest. The Court of Common Pleas of Hamilton County found appellee guilty as charged and placed him on probation for five years.

Upon appeal to the Court of Appeals, appellee's conviction was reversed and the cause remanded to the Court of Common Pleas.

The cause is now before this court upon the allowance of a motion for leave to appeal.

Mr. Simon I. Leis, Jr., prosecuting attorney, and *Mr. Daniel J. Breyer*, for appellant.

Mr. Allen Brown and *Mr. Mark Eckerson*, for appellee.

HERBERT, J. The query posed for resolution in the cause *sub judice* is whether the Fourth Amendment to the United States Constitution is contravened when police, pursuant to standard department procedure, conduct an inventory search of the trunk of a lawfully impounded automobile.

Appellant agrees that a routine inventory search of a lawfully impounded automobile may be no more intrusive than is necessary to protect personal property located within the vehicle, and to guard the interests of the police. Appellant argues, however, that the instant search did not exceed these limitations and was reasonable within the meaning of the Fourth Amendment.

Whether a particular search and seizure is unconstitutional depends upon the facts and circumstances of the

cause. *Cooper* v. *California* (1967), 386 U.S. 58, 59; *Coolidge* v. *New Hampshire* (1971), 403 U.S. 443, 509-510 (Justice Black, concurring and dissenting); *South Dakota* v. *Opperman* (1976), 428 U.S. 364, 373. In *Opperman*, the United States Supreme Court considered the constitutional propriety of police inventory searches. The court stated, at page 373: "[T]his court has consistently sustained police intrusions into automobiles impounded or otherwise in lawful police custody where the process is aimed at securing or protecting the car and its contents." The court concluded that a routine inventory search of a lawfully impounded automobile is not unreasonable within the meaning of the Fourth Amendment when performed pursuant to standard police practice, and when the evidence does not demonstrate that the procedure involved is merely a pretext for an evidentiary search of the impounded automobile. It appears logical to conclude from this that a pretextual search is not an inventory search.

The *Opperman* decision did not condone vehicle inventory searches of unlimited scope. Justice Powell, in his concurring opinion at page 380, stated: "Upholding searches of this type provides no general license for the police to examine all the contents of such automobiles." Nevertheless, in discussing the holding in *Cady* v. *Dombrowski* (1973), 413 U.S. 433, a cause in which the court upheld a custodial search of the trunk of an impounded vehicle, the *Opperman* court stated at pages 374-375: "[T]he protective search [in *Cady*] was carried out in accordance with *standard procedures* in the local police department * * *, a factor tending to ensure that the intrusion would be limited in scope to the extent necessary to carry out the caretaking function." (Emphasis *sic.*)

In the cause at bar, the Court of Appeals concluded that the search of appellee's trunk went beyond the bounds

of *Opperman*. We disagree. In our opinion, a standard inventory search of the trunk of a lawfully impounded automobile does not contravene the Fourth Amendment to the United States Constitution. Furthermore, the use of the bags of marijuana as evidence in the trial below was permissible, and the motion to suppress that evidence was properly overruled by the trial court. *United States* v. *Edwards* (C.A. 5, 1978), 577 F. 2d 883, certiorari denied, 99 S. Ct. 458. See *Cady* v. *Dombrowski, supra; United States* v. *Wade* (C.A. 5, 1977), 564 F. 2d 676; *United States* v. *Gravitt* (C.A. 5, 1973), 484 F. 2d 375, certiorari denied, 414 U.S. 1135; *State* v. *Wallen* (1970), 185 Neb. 44, 173 N.W. 2d 372; *State* v. *Walker* (1978), 119 Ariz. 121, 579 P. 2d 1091.

As stated in *United States* v. *Edwards, supra,* at page 893: "[s]o long as the scope of the search is reasonable, taking into consideration the three interests to be protected by the inventory, * * * [it will] be held to be a constitutionally permissible intrusion."* See, also, *United States* v. *Balanow* (N.D. Ind. 1975), 392 F. Supp. 200, affirmed 528 F. 2d 923; *United States* v. *Gerlach* (E.D. Mich. 1972), 350 F. Supp. 180; *People* v. *Trusty* (1973), 183 Colo. 291, 516 P. 2d 423; Annotation 48 A.L.R. 3rd 537.

The judgment of the Court of Appeals is reversed and the judgment of the Court of Common Pleas is affirmed.

Judgment reversed.

CELEBREZZE, C. J., P. BROWN, SWEENEY, LOCHER and HOLMES, JJ., concur.

W. BROWN, J., dissents.

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* *South Dakota* v. *Opperman* (1976), 428 U.S. 364, at page 369, recognized that inventory procedures are designed to accommodate the following distinct needs: (1) the protection of the owner's property while it remains in police custody; (2) the protection of police against claims or disputes over lost or stolen property; and (3) the protection of the police from potential danger.

APPENDIX B

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. C-77635

STATE OF OHIO,
Plaintiff-Appellee,

vs.

RANDOLPH F. ROBINSON,
Defendant-Appellant.

OPINION

(Filed July 26, 1978)

**APPEAL FROM THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO**

Messrs. Simon L. Leis, Jr., Daniel J. Breyer and Peter C. Weinstein, 420 Hamilton County Court House, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Messrs. Allen Brown and Mark Eckerson, Fifth Level, Barrister House, 216 East Ninth Street, Cincinnati, Ohio 45202, for Defendant-Appellant.

BLACK, J.

Robinson appeals from the overuling of his motion to suppress a quantity of marijuana discovered by the police during an inventory search of his impounded car, conducted in accordance with "Standard Police Procedures."

Officer Donald P. Yost stopped appellant for speeding at fifty miles an hour in a thirty-five mile an hour zone. A routine check of his driver's license disclosed that it had been suspended and he was arrested. While appellant was being transported to the police department by another officer, the arresting officer proceeded with "Standard Police Procedure" for such a case. He called for a wrecker to impound the car on a private parking lot,[1] and he made an inventory of the car's contents. In the locked trunk, he observed an opaque plastic bag as well as wood scraps and a metal box of tools. Opening the plastic bag he found the marijuana which is the subject of appellant's motion to suppress. We reverse the judgment below, finding that the search and seizure went beyond all reasonable scope under the particular circumstances of this case.

All warrantless searches and seizures of persons, houses, papers and effects are in violation of the Fourth Amendment of the United States Constitution unless they are reasonable. In *South Dakota* v. *Opperman* (1976), 428 U.S. 364, the Supreme Court held that an inventory of an automobile made routinely pursuant to "Standard Police Procedure" is reasonable, but the search in that case extended no further than the passenger compartment and the unlocked glove compartment. The Chief Justice noted

[1] We have no difficulty with the legality and propriety of the arrest of appellant or the impoundment of his car under the stated circumstances.

that there are cases which "have recognized that standard inventories often include an examination of the glove compartment, since it is a customary place for documents of ownership and registration, . . ., as well as a place for the temporary storage of valuables." *Id.* at 372. However, the locked trunk of Opperman's automobile was not entered and its contents were not inventoried. As stated by Justice Powell in his concurring opinion, *Id.* at p. 379, ". . . the unrestrained search of an automobile and its contents would constitute a serious intrusion upon the privacy of the individual in many circumstances. . . . Upholding searches of this type [referring to the Opperman search] provides no general license for the police to examine all the contents of such automobiles." Justice Powell noted that the trunk had not been searched because it was locked. *Id.* 380 n. 7. There are limitations to the scope of any inventory search, and we believe that in the instant case that scope was exceeded.

In *Cady* v. *Dombrowski* (1973), 413 U.S. 433, the Supreme Court held the seizure of bloody items (including a pair of police uniform trousers, a pair of gray trousers, a night stick with the name "Dombrowski" stamped on it, a raincoat, a portion of a car floor mat, and a towel) in the locked trunk of a car towed from an accident to a private garage for safe keeping was reasonable under the circumstances of that case. The police who searched the car had the following information: (1) Dombrowski had wrecked the car and was a Chicago police officer who was required to carry a service revolver at all times; (2) Dombrowski was drunk; (3) there was a flashlight in the passenger compartment of the car with a few spots of blood on it; (4) the revolver was not on Dombrowski's person nor in the passenger compartment. *Dombrowski* is distinguishable on its facts from the present case, the prin-

ciple difference being that the cause of the search there was the missing service revolver, which could have fallen into the wrong hands. There is no similar cause for the search in the instant case.

We have held searches to be unreasonable under similar, albeit not identical, circumstances. The inventory search of an impounded car was unreasonable where the purpose may have been to discover evidence to be used in the prosecution of the defendant. *State* v. *Jones,* No. C-76341 (1st Dist. May 25, 1977). Contraband was held illegally seized when it was in a closed envelope which happened to fall from the defendant's purse as she was looking for identification when accosted by the police in an apartment whose owner had called police to get defendant and others to leave. *State* v. *Strayhorn,* No. C-77371 (1st Dist. April 12, 1978). Contraband was suppressed when it was discovered by a police officer who indiscriminately squeezed all baggage coming off a conveyor belt at an airport in order to detect by smell the presence of marijuana in any of the luggage. *State* v. *Apke,* No. C-75002 (1st Dist. April 19, 1976).

We hold that the denomination of the search in the instant case as an inventory search does not remove it from the strictures of the Fourth Amendment, that if performed without a warrant, it must be reasonable, and that not even "Standard Police Practice" will justify the entry of a closed opaque bag inside the locked trunk of a car impounded for a routine traffic violation.

The assignment of error has merit. The motion to suppress should have been granted. We reverse the judgment below and remand this cause for further proceedings according to law.

BETTMAN, P. J. and CASTLE, J., Concur.

APPENDIX C

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

No. B770734

THE STATE OF OHIO

vs.

RANDOLPH F. ROBINSON

COURT FINDING ON PLEA OF NO CONTEST

(Entered July 27, 1977)

This Cause came on this day to be heard, the Defendant having entered a Plea of No Contest, and was submitted to the Court.

And, the Court hereby finds said Defendant is Guilty of Trafficking Offense (Possession) 2925.03 R.C. sentence deferred, referred to Probation Department for investigation and report, Defendant released on same bond.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-431

RANDOLPH ROBINSON,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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OPINIONS BELOW

The June 27th, 1979, opinion of the Supreme Court of Ohio, of which petitioner seeks review, is reported at 58 Ohio St. 2d 478, 391 N.E. 2d 317 (1979), and is set forth in petitioner's brief as Appendix "A". The opinion of the Ohio First District Court of Appeals is unreported and set forth in petitioner's brief as Appendix "B".

JURISDICTION

On June 27th, 1979, the Ohio Supreme Court issued an opinion holding that a standard inventory search of the trunk of a lawfully impounded automobile does not contravene the Fourth Amendment to the United States Constitution. It should be pointed out that the propriety of the impoundment of the automobile involved was never questioned in the Supreme Court of Ohio. Petitioner seeks jurisdiction in this Court pursuant to 28 U.S.C. Section 1257 (3), claiming that certain evidence was seized in violation of his constitutional rights.

QUESTIONS PRESENTED

I. Will the United States Supreme Court consider and decide federal constitutional issues which have neither been raised before, nor passed upon by, the Ohio Supreme Court?

II. Where an individual has been placed under custodial arrest for driving while under suspension, and he has been removed from the scene of the arrest by the police, may the police reasonably impound the individual's automobile when that vehicle has been left sitting squarely in the middle of a public road?

III. Is the routine inventory of the contents of a vehicle lawfully impounded by police reasonable when it is performed in response to several distinct needs, to wit: the protection of the owner's property while it remains in police custody, the protection of the police against claims or disputes over lost or stolen property, the protection of the police from potential danger, and when such practice is also an essential response to incidents of theft or vandalism?

IV. Is the routine inventory or search of a lawfully impounded automobile reasonable in scope when it is conducted in a manner designed to be no more intrusive than is necessary to protect the owner's property while it remains in police custody, to protect the police against claims or disputes over lost or stolen property, to protect the police from potential danger, and to respond to incidents of theft or vandalism?

V. When the trunk of an automobile is the logical repository for the temporary storage of valuables, is an inventory which, pursuant to established police department procedure, includes an examination of the trunk reasonable and in conformity with the provisions of the Constitution of the United States?

CONSTITUTIONAL PROVISIONS

1. Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seaches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

2. Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immuni-

ties of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, Randolph Robinson, was arrested on February 19th, 1977, for Driving Under Suspension. He was transported to the Greenhills, Ohio, police station by a police cruiser and his own automobile was impounded. Incident to impoundment, Officer Donald Yost of the Greenhills Police Department inventoried the contents of the vehicle pursuant to established departmental policy. As a consequence of this inventory he discovered, in plain view, a large quantity of marijuana.

Robinson was subsequently indicted by the Hamilton County, Ohio, grand jury for the offense of Possession of Marijuana above the bulk amount, a violation of Ohio Revised Code, Section 2925.03 (A) (4). Prior to trial a motion to suppress evidence was filed by Robinson and heard by the Honorable Thomas C. Nurre, a Judge of the Hamilton County Court of Common Pleas. The motion was overruled on June 7th, 1977.

On September 28th, 1977, Robinson withdrew his plea of not guilty and entered a plea of no contest to the offense charged in the indictment. The Court found him guilty of that crime and from that conviction Robinson brought an appeal in the Court of Appeals for the First District of Ohio under number C 77635. That appeal alleged that the trial court had erred in denying Robinson's motion to suppress evidence filed prior to trial. The

Court of Appeals reversed the trial court's judgment and the State of Ohio's subsequent motion for leave to appeal was granted by the Ohio Supreme Court on November 9, 1978. In a decision rendered on June 27, 1979, the Ohio Supreme Court, relying on *South Dakota* v. *Opperman* (1976), 428 U.S. 364, reversed the Court of Appeals and reinstated the judgment of the trial court. Robinson now petitions this Court for a writ of certiorari.

The relevant facts pertaining to this petition are as follows. On February 9, 1977, Officer Donald P. Yost of the Greenhills, Ohio, police department observed an automobile proceeding south-bound on Winton Road at a high rate of speed. Yost began following the vehicle and was shortly able to determine that the automobile was travelling at 50 miles per hour in a 35 mile per hour zone. Yost stopped the speeding car on Winton Road, just outside of Greenhills, about two hundred feet north of Valley View Drive (TP 5). Winton Road at that point is a heavily traveled four lane highway while Valley View Drive is a lesser used two lane road.

Yost approached the offending vehicle and asked for the operator's license of the driver. After obtaining the license Yost instructed the driver to pull his vehicle off the four lane highway onto the less traveled Valley View Drive. The driver, who at this point was identified as Randolph Robinson, complied with the officer's request. Yost returned to his cruiser and followed Robinson onto the smaller road where both vehicles were stopped square in the lane of traffic (TP 10-11).

Officer Yost then ran a computer check on Randolph Robinson's operator's license. The computer report revealed that Robinson's driving privileges were, at that time, under suspension. Yost sent an administrative mess-

age to the Bureau of Motor Vehicles by teletype to confirm the possible suspension. When he received such a confirmation, Yost instructed Robinson to get out of his car and Yost placed him under arrest for driving with a suspended operator's license. (TP 13).

It became apparent to Yost, at this point, that Robinson's vehicle would have to be towed from the scene (TP 16). Greenhills Police Department procedure dictates that any time a physical arrest is made and a motor vehicle is in such a manner that the police department cannot totally insure its safety, that vehicle is to be impounded and removed to a place of safety (TP 36). The impoundment was further made necessary by the fact that Greenhills Police Department procedure prohibits police officers from driving the defendant's automobile and the defendant himself was not qualified to drive due to the apparent suspension (TP 39). Vehicles impounded by the City of Greenhills are towed by a private wrecker to a private lot maintained in connection with a service station. The driver of the wrecker insists upon retaining at least the ignition key so that the impounded automobile may be moved around the lot (TP 25).

Yost requested another police vehicle to respond to the scene for the purpose of transporting Robinson to the police station (TP 14). Realizing that he was going to be conveyed in this manner, Robinson asked for the keys to his vehicle. Yost advised him that:

> "they were necessary for the wrecker, that I reckoned they would be given back to him after the car was towed." (TP 13)

Robinson made no response to this explanation by Officer Yost and there is no evidence in the record that Robinson

asked to lock the automobile himself or that he evidenced any further interest whatsoever in the automobile. After Robinson was taken away, Yost summoned a wrecker for purposes of impounding the vehicle (TP 15). Since there were valuables within plain view inside the automobile Yost decided to and did perform an inventory of the vehicle while awaiting the wrecker (TP 16, 17).

The Greenhills police department has a standard procedure to be followed in conducting an inventory of an automobile which is to be impounded. Any time a physical arrest is made and a motor vehicle is in such a manner that the police department cannot totally insure its safety, that vehicle is to be impounded and removed to a place of safety. Before being removed from the initial scene, the individual officer will inventory the entire contents of the vehicle and maintain a record of that inventory (TP 36). Departmental policy does not require that the inventory be performed in front of witnesses as the officers frequently work by themselves and the presence of a witness would not be practical (TP 23). The appropriate inventory forms are kept in the police cruisers (TP 17).

In the case at bar, Officer Yost scrupulously adhered to police departmental procedures. He obtained an inventory form from his cruiser, and began taking inventory of the contents of the motor vehicle to be impounded. Yost duly recorded the contents pursuant to departmental regulations (TP 17). He checked the passenger compartment of the vehicle for valuable articles and recorded them. Then he checked the glove compartment for valuable articles and recorded its contents. Yost then entered the trunk and recorded the articles of value found there (TP 19-20). He did this because he was of the opinion that the trunk of this particular vehicle could not be sufficiently secured for valuable articles (TP 27).

Inside the trunk, Officer Yost found a metal toolbox, a large number of wood scraps, caulking compound, loose nails, rags, a large white plastic bag and an assortment of articles he deemed to be without intrinsic value (TP 20, 22). After examining the inside of the metal toolbox, Officer Yost was of the opinion that the tools inside were of such considerable value that they should be removed from the automobile. Consequently, the toolbox, along with certain other valuables found in the passenger compartment, was removed from the car and locked in the police station (TP 22, Appendix A). Upon looking inside the large plastic bag to determine the value of its contents, Yost discovered approximately fourteen (14) smaller plastic bags containing some sort of green vegetation. These bags were also removed from the vehicle.

REASONS FOR DENYING WRIT

I. WILL THE UNITED STATES SUPREME COURT CONSIDER AND DECIDE FEDERAL CONSTITUTIONAL ISSUES WHICH HAVE NEITHER BEEN RAISED BEFORE, NOR PASSED UPON BY, THE OHIO SUPREME COURT?

This Court has held many times that it will not decide federal constitutional issues raised before it for the first time on review of state court decisions. See *Cardinale* v. *Louisiana* (1969), 89 S. Ct. 1161, and the numerous cases cited therein.

In the first, second, and fourth questions which petitioner presents to this Court for review, he challenges the propriety of the impoundment of his automobile.

This issue was clearly *not* before the Ohio Supreme Court and was not passed upon by that court. The Ohio First District Court of Appeals stated in their decision, attributing it no more respect than a footnote, that:

> "We have no difficulty with the legality and propriety of the arrest of appellant or the impoundment of his car under the stated circumstances."

This statement was never challenged either by the State of Ohio or by Randolph Robinson. The state's appeal to the Ohio Supreme Court was restricted to the issues of whether the taking of an inventory constituted a search and what the permissible scope of such an inventory might be. That the propriety of the impoundment was never before the Ohio Supreme Court is patently obvious from that court's decision, wherein it is stated:

> "The query posed for resolution in the cause *sub judice* is whether the Fourth Amendment to the United States Constitution is contravened when police, pursuant to standard department procedure, conduct an inventory search of the trunk of a *lawfully impounded automobile*" (emphasis added).

In the instant case, the "legality and propriety of the arrest of appellant or the impoundment of his car "is an issue which was not presented in the Ohio Supreme Court." Petitioner's claims that such an issue was briefed and argued by both parties in the Ohio Supreme Court is simply not true. It is respectfully submitted that any issue dealing with the propriety of the vehicle impoundment in the instant case is not properly before this Court. See *Shadwick* v. *City of Tampa* (1972), 92 S. Ct. 2119; *Tacon* v. *Arizona* (1973), 93 S. Ct. 998; *United States* v. *Ortiz* (1975), 95 S. Ct. 2585.

II. WHERE AN INDIVIDUAL HAS BEEN PLACED UNDER CUSTODIAL ARREST FOR DRIVING WHILE UNDER SUSPENSION, AND HAS BEEN REMOVED FROM THE SCENE OF THE ARREST BY THE POLICE, MAY THE POLICE REASONABLY IMPOUND THE INDIVIDUAL'S AUTOMOBILE WHEN THAT VEHICLE HAS BEEN LEFT SITTING SQUARELY IN THE MIDDLE OF A PUBLIC ROAD?

Although the issue was not presented in, nor faced by, the Ohio Supreme Court, petitioner now asks this Court to consider the legality and propriety of the impoundment of his automobile. Petitioner points out several factors which he feels would have dictated against the police seizure of his automobile. These include:

1) the custodial arrest of petitioner took place a mere mile from his home;

2) it was eventually discovered that petitioner's license was valid;

3) the police station was but one-half (½) mile from the scene of the arrest;

4) the car could have been left parked on the side of the road.

These representations by petitioner have one thing in common. They appear no place in the records of the case at bar.

The critical facts which are preserved in the transcript of the hearing on petitioner's motion to suppress deserve some mention. Robinson was stopped by a single police officer for speeding. A subsequent and conscientious check

revealed that Robinson's privilege to drive a motor vehicle in Ohio had been suspended. Robinson was placed under arrest and transported from the scene. His automobile was left standing squarely in the center of a public road. Greenhills, Ohio, police regulations dictate that any time a physical arrest is made and a motor vehicle is in such a manner that the police department cannot totally insure its safety, that vehicle is to be impounded and removed to a place of safety (TP 36). Once Robinson was made aware of the fact that his vehicle was to be towed, he offered no alternative suggestions to that procedure. This case, with an unattended automobile standing squarely in the center of a public road, is similar to *Cady* v. *Dombrowski* (1973), 93 S. Ct. 2523, wherein an automobile, at the direction of police and for elemental reasons of safety, was towed to a private garage. Here, as in *Cady, supra,* there is no suggestion, substantiated in the record:

> ". . . that the officers' action in exercising control over it by having it towed away was unwarranted either in terms of state law or sound police procedure."

It is submitted that the impoundment of petitioner's automobile was the only reasonable course of action available to Officer Yost. To have done otherwise would have been irresponsible and would have constituted a violation of the officer's duty towards those citizens travelling lawfully upon the public highways.

III. **IS THE ROUTINE INVENTORY OF THE CONTENTS OF A VEHICLE LAWFULLY IMPOUNDED BY POLICE REASONABLE WHEN IT IS PERFORMED IN RESPONSE TO SEVERAL DISTINCT NEEDS, TO WIT: THE PROTECTION OF THE OWNER'S PROPERTY WHILE IT REMAINS IN POLICE CUSTODY, THE PROTECTION OF THE POLICE AGAINST CLAIMS OR DISPUTES OVER LOST OR STOLEN PROPERTY, THE PROTECTION OF THE POLICE FROM POTENTIAL DANGER, AND WHEN SUCH PRACTICE IS ALSO AN ESSENTIAL RESPONSE TO INCIDENTS OF THEFT OR VANDALISM?**

IV. **IS THE ROUTINE INVENTORY OR SEARCH OF A LAWFULLY IMPOUNDED AUTOMOBILE REASONABLE IN SCOPE WHEN IT IS CONDUCTED IN A MANNER DESIGNED TO BE NO MORE INTRUSIVE THAN IS NECCESSARY TO PROTECT THE OWNER'S PROPERTY WHILE IT REMAINS IN POLICE CUSTODY, TO PROTECT THE POLICE AGAINST CLAIMS OR DISPUTES OVER LOST OR STOLEN PROPERTY, TO PROTECT THE POLICE FROM POTENTIAL DANGER, AND TO RESPOND TO INCIDENTS OF THEFT OR VANDALISM?**

V. **WHEN THE TRUNK OF AN AUTOMOBILE IS THE LOGICAL REPOSITORY FOR THE TEMPORARY STORAGE OF VALUABLES, IS AN INVENTORY WHICH, PURSUANT TO ESTABLISHED POLICE DEPARTMENT PROCEDURE, INCLUDES AN EXAMINATION OF THE TRUNK REASONABLE AND IN CONFORMITY WITH THE PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES?**

In *South Dakota* v. *Opperman,* 428 U.S. 364 (1976), the United States Supreme Court established that inventories made pursuant to standard police procedures were reasonable. The court there stated:

> ". . . this court has consistently sustained police intrusions into automobile impounded or otherwise in lawful police custody where the process is aimed at securing or protecting the car and its contents." *Opperman, supra,* at 3099.

In reversing the Supreme Court of South Dakota, the United States Supreme Court, citing numerous state court decisions, held that the routine inventory of a defendant's locked automobile which had been lawfully impounded did not involve an "unreasonable" search in violation of the Fourth Amendment, especially since the inventory was prompted by the presence in plain view of a number of valuables inside the vehicle.

In the case at bar, a review of the facts makes it obvious that petitioner Robinson's vehicle was lawfully impounded. Indeed, in its decision reversing the trial court, the First District Court of Appeals stated:

> "We have no difficulty with the legality and propriety of the arrest of appellant or the impoundment of his car under the stated circumstances."

After the decision was made to impound the vehicle, the arresting officer observed valuable articles within plain view inside the automobile. For this reason, the officer decided to and did perform an inventory of the contents of the vehicle. This inventory was performed strictly in accord with the established police department procedure. Every article discovered was listed on a standard form which had been carried in the police cruiser and the valuable articles were removed to the safety of the police department.

There can be no doubt that the police officer in the instant case inventoried the contents of the vehicle to accomplish several goals, to wit: the protection of the owner's property while it remained in police custody, the protection of the police against claims or disputes over lost or stolen property, and to prevent and discourage theft and vandalism. It is submitted that on the basis of *Opperman* and the numerous decisions cited therein, this court must agree that police officers, who follow a standard departmental and routine procedure in securing and inventorying the contents of an impounded automobile, are acting reasonably and not in violation of the Fourth Amendment.

Petitioner contends that the scope of the inventory in the instant case was unreasonable. The Ohio Supreme Court expressly rejected that contention, citing to the rationale set forth in *Opperman, supra,* and *United States* v. *Edwards* (C.A. 5, 1978), 557 F. 2d 883, cert. den. 99 S. Ct. 458.

The scope of a search or other intrusion must be strictly tied to and justified by the circumstances which renderd its initiation permissible. See *Terry* v. *Ohio,* 88 S. Ct. 1868, 1878 (1968). Courts have held previous searches which

were reasonable at their inception to have violated the Fourth Amendment by virtue of their "intolerable" intensity and scope.

In *Chimel* v. *California,* 89 S. Ct. 2034 (1969), police officers arrested petitioner in his home and incident to this arrest proceeded to conduct an extensive search of his entire three bedroom house, including the attic, garage, and workshop. The reason advanced to justify this warrantless search was the "search incident to an arrest" exception. The established rationale for that exception was to prevent an arrested person from obtaining weapons or destructible evidence from his person or the immediate area within his reach. The Supreme Court suppressed evidence seized in the house as it felt the officers had exceeded the allowable scope of a "search incident to an arrest". It was clear in that case that a handcuffed defendant could not retrieve weapons from his attic, garage, or other areas far removed from his person. See also *Stanley* v. *Georgia,* 89 S. Ct. 1243 (1969).

In the context of an inventory of a lawfully impounded vehicle, the scope of such inventory is reasonable if it is conducted in a manner designed to be no more intrusive than is necessary to accomplish the goals which rendered its initiation permissible. These goals include the protection of the owner's property while it remains in police custody, the protection of the police against claims of lost or stolen property, the protection of the police from potential danger, and to respond to incidents of theft or vandalism, *Opperman, supra.*

It should be beyond dispute that the scope of a legitimate inventory could logically and validly extend to the trunk of a vehicle and its contents. If the purpose of an inventory is to record the valuables and other personal prop-

erty found in an impounded automobile, it would seem illogical to limit the inspection to a cursory glance at the passenger compartment. The trunk of a vehicle is a logical repository for the temporary storage of valuables. To hold that a locked car could be entered to record valuables in plain view but a locked trunk could not be entered would be a holding glaringly inconsistent with the established needs initially responsible for justifying any inventory procedure. Furthermore, although in *Opperman* the incriminating evidence was not found in the trunk, the court in *Opperman* indicated that they were making their decision on the basis of *Cady* v. *Dombrowski,* 93 S. Ct. 2523 (1973). In *Cady,* the Supreme Court specifically stated:

> "Where, as here, the trunk of an automobile which the officer reasonably believed to contain a gun, *was vulnerable to intrusion by vandals,* we hold that the search was not 'unreasonable' within the meaning of the Fourth and Fourteenth Amendments."

Many state and federal courts have been faced with the issue of an inventory search both before and after *Opperman.* In *United States* v. *Friesen,* 545 F. 2d 672 (9th Cir. 1976), the inventory of the contents of a suitcase was upheld on the basis of *Opperman.* In *United States* v. *McCambridge,* 551 F. 2d 865 (1st Cir. 1977), the court upheld the right of law enforcement officials to inventory the contents of an impounded car, including the contents of a suitcase within the trunk. The court based their decision on *Opperman.* See also *United States* v. *Morrow,* 541 F. 2d 1229 (7th Cir. 1976); *United States* v. *Martin,* 556 F. 2d 1143 (10th Cir. 1977); *United States* v. *Walton,* 538 F. 2d 1348 (8th Cir. 1976); *United States* v. *Finnegan,* 568 F. 2d 637 (9th Cir. 1977); *United States* v. *Barnes,* 443 F. Supp. 137 (S.D. New York, 1977); *United States* v. *Thrower,* 442 F. Supp. 272 (E.D. Pa. 1977).

The few state courts which have invalidated inventory procedures have done so for various reasons unconnected with the actual scope of the search, namely, that the impoundment was not justified or the inventory not done pursuant to standard departmental procedure. Interestingly enough, California and South Dakota have ignored the decision rendered by the Supreme Court in *Opperman* on the basis that their state constitutions imposed higher standards than did the Fourth Amendment. The same California courts have likewise invalidated searches incident to arrest. See *People* v. *Norman,* 538 F. 2d 237 (Cal. 1975). However, the vast majority of state courts have also upheld inventory procedures more extensive than those employed in the present case. See *Griffin* v. *State,* 372 N.E. 2d 497 (Ind. App. 1978); *Commonwealth* v. *Tisserand,* 363 N.E. 2d 530 (Mass. App. 1977); *In Re: One 1965 Econoline, Etc.,* 511 P. 2d 168 (Ariz. 1973); *State* v. *Wallen,* 173 N.W. 2d 372, *cert. denied* 90 S. Ct. 211 (1970); *State* v. *Virgil,* 524 P. 2d 1004, *cert. denied* 420 U.S. 955 (N. Mex. App. 1974).

In considering the facts of the case at bar, it cannot be doubted that the inventory performed by Officer Yost was reasonable both in initiation and in scope. The inventory was prompted by the presence of valuables in plain view within the automobile. The inventory procedure was conducted in accord with established departmental procedure. The proper form for such an inventory was carried in the police cruiser, filled out on the scene, and very detailed. Furthermore, the evidence indicates that Officer Yost was of the opinion that the trunk of Robinson's car was easily accessible to vandals (TP 27). He acted in a proper manner in inspecting Robinson's trunk. Once inside the trunk, a further investigation was required to determine which articles required removal to

the police station for adequate protection. It is submitted that it would have been highly unreasonable for Yost to have locked the tools in the police station and abandoned potential valuables in the garbage bag inside a trunk highly accessible to vandals. See, for example, *People* v. *Hamilton*, 371 N.E. 2d 1234 (Ill. App. 1978), wherein the court hinted that the inventory of an individual's belongings would have been more reasonable had it been *more* extensive. The state would vigorously contend that glancing inside the garbage bag was *reasonable* and necessary to achieve the protections sought by virtue of an inventory. To have done less would have been irresponsible. In *United States* v. *Barnes*, 443 F. Supp. 137 (S.D. N.Y. 1977), the court upheld an inventory which extended to smaller bags inside a trunk. The court based their decision on *Opperman* and *Cady*. The goal was to guarantee the protections made clear in *Opperman*.

Finally, the State of Ohio would strongly direct this Court's attention to *United States* v. *Edwards*, 577 F. 2d 883 (5th Cir. 1978), *cert. den.* 99 S. Ct. 458, in which the Fifth Circuit upheld as reasonable an inventory which extended to looking under the carpeting on an automobile's floor. In *Edwards*, pursuant to standard practice, the police conducted an inventory of the automobile's contents. The scope of such a search was put "squarely" into issue by both parties. Rejecting the defendant's contention that the search was pretextual, the court proceeded to clearly enunciate what the State of Ohio here contends is the appropriate rule:

> ". . . the three interests set forth in *Opperman* can be adequately protected if the inventory search is limited in scope to those places within the interior or trunk of an automobile where, under the particular circumstances of the case, property of the owner or occupant can reasonably be expected to be found." *Edwards*, 577 F. 2d at 893.

In applying this rule to the case before them the Fifth Circuit Court went on to say:

> "We now turn to the facts of this case to determine whether the inventory search was reasonable. There can be no doubt that the search was thorough. The record reveals that the officers searched the glove compartment, the trunk, under the seats, and even the crevices between the seats. However, we refuse to necessarily equate thoroughness with unreasonableness. The reasonableness of the search of the automobile floor, under a loose 'carpet flap' in particular, is the issue with which we are confronted today.
>
> The starting point of our analysis is that the police, in conducting an inventory search, may ordinarily inspect the glove compartment, the trunk, on top of the seats as well as under the front seats, and the floor of the automobile. An inspection of these areas is reasonable because these are common locations in or on which it is reasonably to be expected that the owner or occupant of an automobile may place items of personalty. The intrusion, although serious, is justified by the need to protect the property of the owner, and to protect the police from claims. This is to say no more than in the typical case it is not unreasonable for the police to search such places while conducting an inventory.
>
> * * *
>
> We today hold that in conducting an inventory search pursuant to standard police practice, an officer may search those places within an automobile where, under the facts of the particular case, he can reasonably conclude that personal property may be located." *Edwards, supra,* at 894-5.

An examination of the facts of the case at bar in light

of the *Edwards* decision makes it very clear that Officer Yost's conduct was eminently reasonable. He searched those areas of the automobile which constituted likely repositories for the storage of valuables. Furthermore, in light of the Greenhills Police Department's policy of protecting valuables by storage in the police vault, it would have been unreasonable for Yost to have locked the toolbox, tape decks, tapes, etc., in the police station and then abandoned potential valuables in the garbage bag when it was so convenient to glance inside to determine the value of the bag's contents. This is especially so in light of Yost's opinion that the trunk was highly accessible to vandals and the fact that the car was to be stored at a private, non-police lot.

It is respectfully submitted that the inventory performed in the instant case was reasonable in scope and that the evidence inadvertently discovered thereby was admissible at trial as was determined by the trial court.

CONCLUSION

Respondent respectfully submits that the petition for Writ of Certiorari should be denied. This case presents no new or novel constitutional issues. The factual situation presented falls squarely within the parameters of the Court's decisions in *South Dakota* v. *Opperman* and *Cady* v. *Dombrowski*. Neither of those decisions need further elaboration and this case is certainly not the factual vehicle to lend itself to further clarification of those cases. The vast majority of the "facts" now relied upon by petitioner do not exist in the record below. Many of the questions now submitted to this Court were not presented before the Ohio Supreme Court. The Petition for Writ should be denied.

Respectfully submitted,

SIMON L. LEIS, JR.
Prosecuting Attorney

LEONARD KIRSCHNER
Ass't Prosecuting Attorney

DANIEL J. BREYER
Ass't Prosecuting Attorney

COMP #_____

DATE 2/9/76

GREENHILLS POLICE DEPARTMENT
HAMILTON COUNTY OHIO

CIT#_____

TIME 10:30 pm

REPORT OF MOTOR VEHICLE IMPOUNDMENT AND INVENTORY OF PROPERTY

VEHICLE:
MAKE ~~Plym~~ Plym MODEL Pet Vol YEAR 1976 COLOR Brn LICENSE # 9895CN.
OWNER Randolph Robinson ADDRESS 8317 Beta Ave.
DRIVER Same. ADDRESS
OTHER PERSON HAVING CONTROL OF VEHICLE
ADDRESS REASON

REASON FOR IMPOUNDMENT Traffic Arrest.

PROPERTY IN VEHICLE:
PASSENGER COMPARTMENT:
1. Automatic Radio tape deck SN 366587
2. Pioneer Tape deck SN WA 25753
3. 2 Sets Jumper Cables / 19 8 track tapes.
4. one Combination Carpenter Square
5. Hema stat one box of baggies.
6. one pair Channel Locks
7. 19 8 track tapes / 1 case Adolph's 3 year Subs. Tote.
8. 1 Chisel, 1 Screw driver, on Pair Pliers, one 3ft Length Copper wire.
9. 1 box of nails one Baseball Glove, 8 empty bottles.
10. one Set Windshield wipers.

GLOVE COMPARTMENT:
1. one Pair Gloves
2.
3.
4.
5.

TRUNK:
1. Assorted Wood Scraps
2. One metal tool box
3. 6 tubes caulking Compound
4. one Bag containing 14 individual bags of green vegetation
5.
6.
7.
8.
9.
10.

OFFICER MAKING INVENTORY: David P. Jarvis

ARTICLES REMOVED FROM VEHICLE:
1. two tape decks, 19 tapes, metal tool box, 14 plastic
2. bags of green vegetation
3.
4.
5.

DISPOSITION OF VEHICLE: Forest Park Texaco.
DISPOSITION OF KEYS: Ignition to Wrecker Driver.
REMARKS: others to owner.

EXHIBIT
PLF - DEF
STATE

APPENDIX A
Completed Inventory Form